RECENT AMERICAN DECISIONS.

In the United States Court of Claims—January 1856.

STURGES, BENNETT & CO. *vs.* THE UNITED STATES.

1. Where certain liquors were imported into the United States in casks, which upon being gauged were found to be reduced in quantity by leakage, it was held that no duties could be imposed except upon the quantity which actually arrived in the country, and which is to be ascertained by the gauger's return.
2. Mode of recovering excess of duties, or estimated duties under Acts of March 3, 1839; February 26, 1845, and August 8, 1846, considered and commented on.

Messrs. *Charles Abert* and *John O. Sargent*, for claimants.

M. Blair, solicitor for United States.

The opinion of the court was delivered by

SCARBURGH, J.—In this case the petitioners allege, that during the years 1847, 1848, 1849, and 1850, they imported into the United States certain quantities of brandy and other liquors in casks, and paid duties thereon at the rate of one hundred *per centum*, not only on the value of the quantity of liquor ascertained by gauge to be contained in the casks, but also on the value of the quantity of liquor which had leaked out of the casks on the voyage of importation; and that they claim a return of the moneys extracted from them as import duties on such leakage, or non-imported liquors.

The petitioners refer in their petition to a statement prepared by the collector of New York, by order of the Secretary of the Treasury, for a particular account of their claim. From this statement, it appears that, under instructions of the Secretary of the Treasury, the duties upon their importations were levied according to their invoice value, without reference to deficiencies, unless arising from accident at sea. It was conceded in the argument submitted in this case, that the leakage arose not from any accident at sea, but from other causes, and that the deficiency was ascertained from the return of the gaugers.

The act of Congress entitled "An act reducing the duty on imports, and for other purposes," approved July 30th, 1846, imposed

a duty of *one hundred per centum ad valorem* on brandy and other spirits, distilled from grain or other materials imported from foreign countries. According to the principles settled by the cases of *Marriott* vs. *Brune*, 9 How. 619; *The United States* vs. *Southmayd*, Ibid. 637; and *Lawrence* vs. *Caswell*, 12 How. 488—this duty is imposed, not upon the quantity of brandy which may have been purchased abroad, but upon the quantity which actually arrives in the country.

In the case of *Marriott* vs. *Brune*, duties had been imposed upon importations of sugar and molasses made after the act of 1846, according to invoice quantity; but the report of the weighers and gaugers showed a deficiency between that quantity and the quantity actually imported. Mr. Justice Woodbury, who delivered the opinion of the court, said: "The general principle applicable to such a case would seem to be, that revenue should be collected only from the quantity or weight which arrives here. That is, what is *imported;* for nothing is imported until it comes within the limits of a port. (See cases cited in *Harrison* vs. *Vose*, 9 Howard, 372.) And by express provision in all our revenue laws, duties are imposed only on imports from foreign countries, or the importation from them, or what is imported. (5 Stat. at Large, 548, 558.) The very act under consideration imposes the duty on what is imported from foreign countries. (p. 68.) The Constitution uses like language on the subject. (Article 1, sects. 8 and 9.) Indeed, the general definition of customs confirms this view; for, says McCulloch, (Vol. I. p. 548) "Customs are duties charged upon commodities on their being imported into or exported from a country."

"As to imports, they therefore can cover nothing which is not actually brought into our limits. That is the whole amount which is entered at the custom-house; that is all which goes into the consumption of the country;—that, and that alone, is what comes in competition with our domestic manufactures; and we are unable to see any principle of public policy which requires the words of the act of Congress to be extended so as to embrace more.

"When the duty was specific on this article, being a certain rate per pound before the act of 1846, it could of course extend to no

larger number of pounds than was actually entered. The change in the law has been merely in the rate and form of the duty, and not in the quantity on which it should be assessed.

"On looking a little further into the principles of the case, it will be seen that a deduction must be made from the quantity shipped abroad whenever it does not all reach the United States, or we shall in truth assess here what does not exist here. The collection of revenue on an article not existing, and never coming into the country, would be an anomaly—a mere fiction of law—and is not to be countenanced when not expressed in acts of Congress, nor required to enforce just rights."

The same doctrine is directly applied to importations of brandy, in the case of *Lawrence* vs. *Caswell.*

It is moreover held, in these cases, that the quantity actually imported is to be ascertained by the gauger's return. In the case of *Lawrence* vs. *Caswell,* the question whether the duty ought to be computed on the quantity stated in the invoices, or on the contents as ascertained by the gauger's return, was, *in terms,* considered by the court, and the decision was, that the duty ought to be computed on the latter, and that this question was substantially the same with that decided in the case of *Marriott* vs. *Brune.* It may be true, as suggested by the Solicitor, that there is no mode in which the quantity imported can be ascertained with absolute certainty; but there can be no doubt, we think, that the decision of the Supreme Court, recognizing the measurement by gauge as the proper legal method for that purpose, is in conformity both to the acts of Congress and to the usage of the government of the United States for more than half a century.

It is apparent, therefore, that the duties, now sought to be reclaimed, were paid upon brandies not actually imported, and, consequently, that they were not imposed by law. If, therefore, the petitioners be not entitled to relief, it is not because they have not paid the United States money which the acts of Congress did not require them to pay, but because they paid it under such circumstances as took from them the right to require its re-payment.

Prior to the act of March 3d, A. D. 1839, an importer might

maintain an action for the recovery of the excess of duties, or for the recovery of duties illegally exacted against a collector, in two classes of cases: 1st, where the payment was made for unascertained or estimated duties; and, 2d, where it was made under protest. These two classes are distinctly recognized by Daniell, J., in the opinion delivered by him for the majority of the court, in the case of *Carey* vs. *Curtis*, 3 Howard, 243. He said: "It will be remembered that the two principal cases, in which collectors have claimed the right to retain, have been those of unascertained duties, and of suits brought, or threatened to be brought, for the recovery of duties paid under protest. It is matter of history that the alleged right to retain on these two accounts had led to great abuses and to much loss to the public; and it is to these *two* subjects, therefore, that the act of Congress particularly addresses itself." Again: "Besides the litigation spoken of, and which is said to lead to this result, is a litigation for duties paid under protest, and not for overpayment of unascertained duties." (9 How. 242.) Again: "Independently of this statute, the collector might have sued for overpayments on unascertained duties, as well as for duties paid under protest. And it can hardly be reconciled with reason or consistency, that Congress designed to preserve the right of suit in the one case and deny it in the other. Yet, if these words would have the force contended for by the defendant in error, they give the right of action against the collector for duties paid under protest only, leaving the party who has overpaid unascertained and estimated duties no remedy but that of resorting to the Secretary of the Treasury." Ibid. 244.

The effect of the act of March 3d, 1839, was to take away the right of action against collectors in both these classes of cases. (*Carey* vs. *Curtis*, 3 Howard, 236.) But by way of compensation to the importer for the loss of his remedy by action, this act made it the duty of the Secretary of the Treasury, where it should be shown to his satisfaction that in any case of unascertained duties, or duties paid under protest, more money had been paid to the collector or person acting as such than the law required should have been paid, to take the prescribed measures to have it refunded to

the person entitled to the over-payment. It may be proper to remark at this point, (1) that this act did not in any way affect or propose to affect the right of a party making an over-payment in any case therein mentioned to re-payment; and (2) that the power which it confers upon the Secretary of the Treasury is purely *administrative*, and in no sense judicial. If, therefore, under this act, an importer, in a case either of unascertained duties or of duties paid under protest, paid to a collector more money than he was by law required to pay, but could not show to the satisfaction of the Secretary of the Treasury that he had done so, he was without any enforceable remedy; but, nevertheless, the action of the Secretary of the Treasury not being *judicial*, but merely *administrative*, the implied contract of the United States to refund to the importer what had been taken or detained from him without authority of law still remained unsatisfied and undischarged.

Soon after the decision in the case of *Carey* vs. *Curtis* was made, the act of February twenty-sixth, A. D. eighteen hundred and forty-five, was passed. What changes in the law were effected by it? 1. It restored *sub modo* the right of action against a collector in cases of duties paid under protest. And, 2. It required the protest to be made in writing and signed by the claimant at or before the payment of the duties, setting forth distinctly and specifically the grounds of objection to the payment thereof. It is as follows: "That nothing contained in the second section of the act entitled 'An act making appropriations for the civil and diplomatic expenses of the government, for the year one thousand eight hundred and thirty-nine,' approved on the third day of March, one thousand eight hundred and thirty-nine, shall take away or be construed to take away or impair the right of any person or persons who have paid or shall hereafter pay money as and for duties under protest to any collector of the customs or other person acting as such, in order to obtain goods, wares, or merchandise imported by him or them, or on his or their account, which duties are not authorized or payable in part or in whole by law, to maintain any action at law against such collector or other person acting as such, to ascertain and try the legality and validity of such demand and payment of

duties, and to have a right to a trial by jury touching the same, according to the due course of law. Nor shall anything contained in the second section of the act aforesaid be construed to authorize the Secretary of the Treasury to refund any duties paid under protest; nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing and signed by the claimant at or before the payment of said duties, setting forth distinctly and specifically, the grounds of objection to the payment thereof." (5 Stat. at Large, 727.)

But this act is silent upon the subject of unascertained duties. It mentions only duties paid under protest. It is wholly inapplicable, therefore, to unascertained duties, and the rights of an importer in reference to the latter remained the same after as they were before the passage of that act.

The only remaining act of Congress at all connected with the subject, is the act of August 8, A. D. 1846. The second section of that act is as follows: "That the Secretary of the Treasury be, and he is hereby authorized, out of any money in the treasury not otherwise appropriated, to refund to the several persons entitled thereto such sums of money as have been illegally exacted by collectors of the customs under the sanction of the Treasury Department, for duties on imported merchandise since the third of March, eighteen hundred and thirty-three: *Provided*, that before any such refunding, the Secretary shall be satisfied, by decisions of the courts of the United States upon the principle involved, that such duties were illegally exacted. *And provided also*, that such decisions of the courts shall have been adopted or acquiesced in by the Treasury Department as its rule of construction." (9 Stat. at Large, 84.)

That statute has no application to unascertained duties. It in terms applies only to duties *illegally exacted*. Now, unascertained duties, in the strictest sense of those terms, certainly as applicable to a case like the one now under consideration, are not illegally exacted. There can be no illegality as respects them, except in

the detention of the over-payment after the true amount of duties has been legally ascertained.

When an entry is made, the collector, jointly with the naval officer, or alone where there is none, is required by law to make a gross estimate of the amount of duties on the goods entered, and if the goods be entered for home consumption, and not warehoused, no permit will be granted for landing them, until such estimated duties are paid. (1 Stat. at L., p. 664, § 49; 1 Ibid., p. 673, § 62; 9 Ibid., p. 53, § 1.) And if it be necessary, in order to ascertain the duties thereon, to weigh, gauge, or measure the goods, they cannot, without the consent of the proper officer, be removed from the place where they are landed, before they have been weighed, gauged or measured; and if spirits, before the proof or quality and quantity thereof are ascertained and marked thereon, by or under the direction of the proper officer for that purpose. (1 Stat. at L., p. 665, § 51.) So far, therefore, from unascertained duties being duties illegally exacted, they are always demanded and paid in strict conformity to law. The very terms imply that duties are, to some extent, imposed and payable in the particular case, but that the true amount is unknown and unascertained at the time of payment.

The law, in its requirements upon this subject, looks both to the security of the United States, and to the interests of the importer; the just demands of the United States are secured by the payment of the estimated duties, and the goods are liberated without any unnecessary delay, so that they may at once go into the possession of the importer, and enter into his business. But the object, as regards the United States, is to secure their just demands, and nothing more; and the payment is made under an implied contract on the part of the United States, that the excess, if any, beyond the amount of duties actually imposed by law, shall be refunded to the importer. There can be no doubt, then, that in the legal sense, unascertained duties are never illegally exacted, and, consequently, that the second section of the act of Aug. 8, 1846, does not apply to them.

According to these principles, the case under consideration is, in its nature, a case of unascertained duties; but it is insisted on the

part of the United States, that at the time when the importations which it embraces were made, the duties thereon, under a regulation of the Treasury Department, were required to be computed on the invoice quantity, and that the duties in question were therefore ascertained at the time of their payment. Without pausing to inquire whether the consequences deduced from this regulation would necessarily have followed, it is sufficient to remark, that the regulation itself was in conflict with law, and invalid. *Marriott* vs. *Brune; The United States* vs. *Southmayd; Lawrence* vs. *Caswell.*

"The Secretary of the Treasury is bound by the law, and although in the exercise of his discretion, he may adopt necessary forms and modes of giving effect to the law, yet neither he nor those who act under him, can dispense with or alter any of its provisions. It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights and unsupported by law, should afford no ground for legal redress." Per Mr. Justice M'Lean, in *Tracy* vs. *Swartwout*, 10 Peters, 95.

"Any instructions from the Treasury Department could not change the law." Per Mr. Justice Thompson, in *Elliott* vs. *Swartwout*, 10 Peters, 135.

"The various circulars from the Treasury Department, which have been referred to, and which have been construed in some cases to permit the deduction of the quantity not really arriving in this country, and in others to forbid it, are entitled to much respect in deciding on the true meaning of the revenue laws; but when contradictory or obscure, they furnish less aid, and are *never* decisive or incontrollable." Per Mr. Justice Woodbury, in *Marriott* vs. *Brune*, 9 Howard, 634–5.

"The orders as well as the opinions of the head of the Treasury Department, expressed in either letters or circulars, are entitled to much respect, and will always be duly weighed by this court; but it is the laws which are to govern, rather than their opinions of them; and importers, in cases of doubt, are entitled to have their rights settled by the judicial exposition of these laws, rather than by the views of the department. *Marriott* vs. *Brune*, 9 Howard, 634, 635.

And though, as between the custom-house officers and the department, the latter must by law control the course of proceeding (5 Stat. at Large, 566), yet, as between them and the importers, it is well settled that the legality of all their doings may be revised in the judicial tribunals. *Tracy et al.* vs. *Swartwout*, 10 Peters, 95; *United States* vs. *Lyman*, 1 Mason C. C. 534; Opinions of Attorneys General, 1015." *Per* Mr. Justice Woodbury, in *Greely* vs. *Thompson*, 10 Howard, 254.

The regulation of the Treasury Department referred to by the Solicitor, cannot therefore have the influence or effect claimed for it in his argument. The duties in question here are, in their nature, under the acts of Congress, unascertained at the time of their payment, and no regulation of the Treasury Department could deprive the petitioners of the right vested in them by law so to consider and treat them. The obvious reason is, that no such regulation can change the supreme law of the land.

This then being a case of unascertained duties, it was competent for the Secretary of the Treasury, under the act of March 3, 1839, which, for this purpose, is still in force, if it had been shown to his satisfaction that more money had been paid to the collector than the law required should have been paid, to have taken the measures presented by that act to have it refunded to the petitioners. But this, the petitioners allege, he has refused to do upon the grounds that no protest was made, and that a portion of the claim was barred by the statute of limitations. The petitioners, therefore, are entitled to relief unless the action of the Secretary of the Treasury is conclusive against them. We have already stated, that the power of the Secretary of the Treasury under that act is purely administrative, and in no sense judicial. This is sufficiently obvious from the very terms of the act. It did not vest the Secretary of the Treasury with the power of deciding upon the rights of the claimant, except to the extent that he might be required to act upon them. It made it a condition precedent to the party's right to the Secretary's warrant upon the Treasurer for the over-payment, that he should satisfy the former that his claim belonged to one of the classes mentioned in the act, and was well founded. This mode of redress

was thus conditioned and restrained, and for wise and good reasons. It would not have been either proper or politic to have authorized a payment out of the public treasury, to a party whose rights had not been regularly adjudicated and legally ascertained, except upon the very condition imposed by the statute, that he should show to the satisfaction of the head of the Treasury Department that his case was one for which the statute meant to provide. It was not designed that he should obtain relief from a ministerial officer, unless his case was shown to be one on which such officer could act with entire safety to the public interests. If he failed to show such a case, then he failed to obtain the benefit of the statutory remedy; but it was not designed that his rights should be otherwise affected. The implied contract of the United States, in a case of unascertained duties to refund the over-payment, would still continue in full vigor —the decision of the Secretary of the Treasury affecting merely his own official action, and nothing more. And it is no answer to this view, that in such a case the party was without remedy, except by an appeal to the legislative department of the government; for if that were sufficient, then there would be but few cases of contract of which this court could take cognizance.

In the Supreme Court of Indiana.

Before PERKINS, J.

HERMAN *vs.* THE STATE.

1. A law which absolutely forbids the people of the State to manufacture and sell whiskey, ale, porter and beer, for use as a beverage, or at all, except for the government, to be sold by it as medicine, and absolutely prohibits the use of these articles as a beverage, is unconstitutional. Per PERKINS, J.

2. It is an invasion by the government upon the faculties of industry possessed by individuals, when it attempts to appropriate to itself any particular branches of industry, or any business which is not of a public general character.

3. There are certain absolute rights, and the right of property is among them, which in all free governments must of necessity be protected from legislative interference, irrespective of constitutional checks and guards.

4. The power of the legislature to declare nuisances.

PERKINS, J.—Herman was arrested upon a charge of having violated the liquor act of 1855. He obtained a writ of habeas corpus, pursuant to which he is now brought before us at chambers with the cause of his detention in custody.

His counsel moves for his discharge on the ground that said liquor act is unconstitutional and void. The case is submitted to us upon the arguments heretofore filed in the Supreme Court in the case of Bebee.

We regret that this question has been thus presented to us. We had hoped that these applications would have been confined to the inferior courts till the Supreme Court had decided upon the validity of the law in question.

But the legislature, acting, as we think, within the constitution, has conferred upon the citizen the right of suing out the writ of habeas corpus from the judges severally of the Supreme Court; the right has been exercised in this case, and it is not for us, upon slight pretexts, to shrink from the discharge of the duty, thus, as we cannot indeed but believe, injudiciously imposed upon us.

Counsel on both sides concede in argument that the record presents the question of the validity of, at least, what is alleged to be the prohibitory portion of said liquor act, and that question will, therefore, without inquiry upon the point, be considered.

We approach it with all the caution and solicitude its nature is calculated to inspire, and that intention of careful investigation its importance demands, feeling that the consequences of the principles we are about to assert will not be confined in their operation to this case alone. Preliminary to the discussion of the main questions involved, however, the course of argument of counsel requires that we should say a word by way of fairly setting forth the duty this court has to perform in the premises, viz; the simply declaring the constitutionality or unconstitutionality of the law, with an assignment of the reasons upon which the declaration is based.

It will not be for us to inquire whether it be a good or bad law, in the abstract, unless the fact as it might turn out to be, should become of some consequence in determining a doubtful point on the

main question. It not unfrequently becomes the duty of courts to enforce injudicious acts of the legislature because they are constitutional, and to strike down such as at first view, appear to be judicious, because they are in conflict with the constitution.

With these remarks, we proceed to the examination of the feature of the liquor act of 1855 now more especially presented to the court. We shall not spend time upon the inquiry, whether, on the day it came into force there were existing unsold manufactured products in the hands of the distillers and brewers upon which it operated, rendering them valueless, or whether such products had all been disposed of between the passage and taking effect of the law. We shall direct our investigation to the character of its operation upon the future manufacture, sale and consumption of intoxicating liquors. And,

1st. Is it prohibitory?

The first section enacts "that no person shall manufacture, keep for sale, or sell" any "ale, porter, malt beer, lager beer, cider, wine," &c. The second section permits the manufacture and sale of cider and wine under certain restrictions, by any and all of the citizens of the State.

Other sections permit the manufacture of whiskey, ale, &c., by persons licensed for the purpose, so far as may be necessary to supply whatever demand certain persons called county agents may make upon them. These agents are authorized to sell for medicinal, mechanical and sacramental uses, and no other, and may procure their liquors of the licensed manufacturers, but are not required to do so, and, as a matter of fact do not, but obtain them in most cases from abroad. They constitute no part of the people engaged in business on their own account, but are appointed under the law by the county commissioners; supplied with funds from the county treasury; paid a compensation for their services by the county; sell at prices fixed for them, and make the profits and losses of the business for the public treasury and not for themselves. We say they are furnished with public funds. They are so in all cases; for when they, in the first instance, invest their own, it is by way of loan to the county at

a fixed rate of interest, and the amount is refunded by the county with interest. These selling agents, then, are, and for convenience may be denominated government agents; for it is all one in principle whether the government creates and furnishes them with funds through the medium of the counties, or appoints them directly by statute, and supplies them with funds from the State treasury. To express, then, the substance of the main provisions of the law, they may be paraphrased thus:

Be it enacted; 1st. That the trade and business of manufacturing whiskey, ale, porter, and beer, now and heretofore carried on in this State, shall cease; except that any person specially licensed to manufacture for medicine, &c., for the government, may do so, and sell to that extent, if the government should conclude to buy of such person, but not otherwise.

2. That no person in this State shall sell any whiskey, beer, ale or porter, unless the sale be to an agent of the government or by such agent for medicine, &c.

3. That no person in this State shall drink any whiskey, beer, ale or porter, as a beverage, and in no instance except as a medicine.

It thus appears that the law absolutely forbids the people of the State to manufacture and sell whiskey, ale, porter, and beer for use as a beverage; or, at all, except for the government, to be sold by it for medicine, &c.; and it prohibits absolutely the use of those articles by the people as a beverage.

The exception as to the admission of foreign liquors under the constitution and laws of the United States, will not be noticed, for the reason that they are admitted simply because they cannot be prohibited, and not in accordance with the spirit and policy of the State statute; and which foreign liquors may or may not be obtained here according to the contingent action of other powers; and for the further reason, that their admission, if claimed to be a part of the object and policy of the State liquor law, in order to supply the people with liquor as a beverage, renders the law doubly objectionable; for, while, according to such a view, the law

designs to permit the use of liquors as a beverage, it prohibits the people from manufacturing for their own use. It is as if the law were that the people might eat bread but should not raise the grain and grind it into flour wherewith to make it. It would be an act to prohibit the people from themselves producing; and to compel them to purchase from abroad what they might need to eat and drink. It would involve the principle of an act to annihilate the State by starving the people constituting it to death; and such legislation would hardly comport, we think, with a constitution established to promote the welfare and prosperity of the people.

We assume it as established, then, that the liquor act in question is absolutely prohibitory of the manufacture, sale and use as a beverage, by the people of this State, of whiskey, ale, porter, and beer. The opinion has been advanced that the manufacture for sale out of the State is not prohibited, but it has not the substance of a shadow; and the morality of that law which prohibits the distribution of pauperism and crime, disease and death at home, but permits them to be scattered amongst our neighbors, is not to be envied. And we may as well remark here as anywhere, that if the manufacture and sale of these articles are proper to be carried on in the State for any purpose, it is not competent for the government to take the business from the people and monopolize it. The government cannot turn druggist and become the sole dealer in medicines in the State. And why? Because the business was, at and before the organization of the government, and is properly at all times a private pursuit of the people, as much so as the manufacture and sale of brooms, tobacco, cloths, and the dealing in tea, coffee and rice, and the raising of potatoes; and the government was organized to protect the people in such pursuits from the depredation of powerful and lawless individuals, the barons of the middle ages, whom they were too weak to resist single handed by force; and for the government now to seize upon those pursuits is subversive of the very object for which it was created. "A government is guilty of an invasion upon the faculties

of industry possessed by individuals when it appropriates to itself a particular branch of industry, the business of exchange and brokerage for example; or when it sells the exclusive privilege of conducting it." Say's Political Economy, note to p. 134.

There are undertakings of a public character, such as the making of public highways, providing a uniform currency, &c., that a single individual has not power to accomplish, and which government must, therefore, prosecute; but they are not the ordinary pursuits of the private citizen.

These, certainly as the general rule, and we are not now prepared to name an exception, the government cannot engage in.

This is all we shall here say upon this point. Time and space forbid that we should elaborate all that arise in the case.

The question now presents itself—

Secondly. Could the legislature of this State enact the prohibitory liquor law under consideration?

Few, if any, judicial decisions will be found to aid us, in investigating this question, as no such law, in a country possessed of a judiciary and a constitution limiting the legislative power, has, till of late, been enacted. Some twelve hundred years ago Mahomet made such a law a part of his religious creed, in opposition to the Jewish and Christian systems, which recommended the moderate, but forbid the excessive use of intoxicating liquors. This law of Mahomet, Koran, pages 25 and 93, was perhaps the first prohibitory act, but it does not appear to have been adopted by civilized nations till its late revival, in some shape or other, in one or more of our sister States. Hence, it has not often, if at all as to this point, passed under judicial consideration.

A number of European writers on natural, public and civil law, are cited by counsel on behalf of the State, to show the extent of legislative power; but those writers, respectable, able and instructive upon some subjects, as they are admitted to be, are not authority here upon this point. They are dangerous, indeed, utterly blind guides to follow, in searching for the land-marks of legislative power in our free and limited government; for they had in view,

when writing, governments as existing when and where they wrote, under which they lived and had been educated, and which had no written constitutions limiting their powers—governments, the theory of which was that they were paternal in character—that all power was in them by divine right, and they, hence, absolute; that the people of a country had no rights except what the government of that country graciously saw fit to confer upon them, and that it was its duty, as a father towards his children, to command whatever it deemed expedient for the public good, without first in any manner consulting that public, or recognizing in its members any individual rights.

Indeed, the discovery of the great doctrine of rights in the people, as against the government, had not been made when the writers above referred to lived. Such governments as those described, could adopt the maxim quoted by counsel, that the safety of the people is the supreme law, and act upon it; and being severally the sole judges of what their safety, in the countries governed, respectively required, could prescribe what the people should eat and drink, what political, moral and religious creeds they should believe in, and punish heresy by burning at the stake, all for the public good. Even in Great Britain, esteemed to have the most liberal constitution on the Eastern continent, *Magna Charta* is not of sufficient potency to restrain the action of Parliament, as the judiciary do not, as a settled rule, bring laws to the test of its provisions. Laws are there overthrown only occasionally by judicial construction. But here we have written constitutions which are the supreme law, which our legislators are sworn to support, within whose restrictions they must limit their action for the public welfare, and whose barriers they cannot overleap, under any pretext of supposed safety of the people; for along with our written constitutions we have a judiciary whose duty it is, as the only means of securing to the people safety from legislative aggression, to annul all legislative action without the pale of those instruments. This duty of the judicial department, in this country, was demonstrated by Chief Justice Marshall in *Marberry* vs. *Madison*, 1 Cranch, 137,

and has since been recognized as settled American law. The maxim above quoted, therefore, as applied to legislative power, is here without meaning.

Nor does it prove the power of the State legislature to enact the law in question, to show that the Supreme Court of the United States has decided that it cannot declare such a State law inoperative, for that court can only declare void such State laws as conflict with the restrictions imposed upon State power by the Constitution of the United States; and if, in that constitution, the States are not restrained from passing laws in violation of the natural rights of the citizen, the Supreme Court of the United States cannot act upon such laws when passed, because they do not fall within its jurisdiction. Hence, that court has decided that a State may deprive its citizens of property without making compensation, and of the right of trial by jury; *Brown* vs. *The Mayor*, &c., 7 Peters, 243; may pass laws depriving them of vested rights in property, and of the benefit of judgments they may have obtained in courts, and the like; *Satterlee* vs. *Matthewson*, 2 Peters, 380, and the license cases in 5 Howard, 504; and no redress be obtainable in the United States courts, because there are no provisions in the United States Constitution prohibiting the passage of such State laws. But the Supreme Court of this State has decided that, under our State Constitution, the legislature cannot enact a law for the taking of private property without making compensation; cannot deprive the citizen of the right of trial by jury, and cannot set aside the judgment of a court, &c. *Young* vs. *The State Bank*, 4 Ind. Rep. 301; *McCormick* vs. *Lafayette*, 1 Ind. 48; *The State* vs. *Mead*, 4 Blackf. 309.

It does not therefore follow, that because the Constitution of the United States does not prohibit State legislation infringing the natural rights of the citizen, such legislation is valid. The Constitution of the United States may not, but that of the State may, inhibit it.

And so, indeed, according to many eminent judges, may principles of natural justice, independently of all constitutional restraint.

This doctrine has been asserted here. In *Andrews* vs. *Russell*, 7 Blackf. 474, Judge Dewey says: "We have said that the only provisions in the federal or State constitutions restrictive of the power of the legislature, &c. are, &c. There are certain absolute rights, and the right of property is among them, which in all free governments must of necessity be protected from legislative interference, irrespective of constitutional checks and guards."

Should we find, however, in the course of this investigation, that the constitution of our free State does, in fact, sufficiently protect natural rights from legislative interference, as it surely does, or it is grievously defective, it will not become necessary for us to inquire whether, in any event, it might be proper to fall back upon the doctrine above so unhesitatingly asserted.

Does our constitution, then, prohibit the passage of such an act as that now being considered? A dictum is quoted by counsel from the opinion in *Beply* vs. *The State*, 4 Ind. Rep. 264, that "it is competent for the legislature to declare any practice deemed injurious to the public a nuisance, and to punish it accordingly;" and hence, it is reasoned, any property; but dicta, as counsel well know, are not necessarily law; are, in fact, generally unconsidered first impressions, which, all legal experience proves, are thrown out by all judges in giving opinions, as habitually and thoughtlessly as violations of the constitution are perpetrated by the legislature in enacting laws, and infinitely more excusably. Scarcely an elaborate opinion is written not containing them. This the profession well understand, and hence are not misled by them, if erroneous.

And it must be manifest to every one, on a moment's consideration, that the doctrine just quoted cannot be taken for law, and could not have been so intended, in an unlimited sense, by the learned judge who uttered it. The legislature cannot declare any practice it may deem injurious to the public a nuisance, and punish it accordingly. It cannot so declare the practice of reading the Bible, though perhaps the government of Spain once did. It cannot so declare the practice of worshipping God according to the dictates of one's own conscience, though perhaps Massachusetts, in

the days of Roger Williams, did do it. It cannot so declare the practice of teaching schools, though perhaps Virginia might have done so in 1674, when Governor Berkley wrote from that colony: "I thank God there are no *free schools* nor *printing;* and I hope we shall not have these hundred years: for learning has brought disobedience and heresy and sects into the world, and printing has divulged them, and libels against the best government. God keep us from both." It cannot so declare the holding of political meetings and making speeches, the bearing of arms, publishing of newspapers, &c., &c., however injurious to the public the legislature might deem such practices to be; and why? Because the constitution forbids such declaration and punishment, and permits the people to use these practices. So with property; the legislature cannot interfere with it further, at all events, than the constitution permits. In short, the legislature cannot forbid and punish the doing of that which the constitution says they shall have and enjoy. If it can, then we think all will admit that the constitution itself is worthless, the liberties of the people a dream, and our government as despotic as any on earth.

And we may here remark, that the legislature can add nothing to its power over things, by declaring them nuisances. A public nuisance is that which is noxious, offensive to all the people who may come in contact with it; and the offensive quality is in the thing itself, or the particular manner of its use, and is neither increased nor diminished by a legislative declaration. What the legislature has a right by the constitution to prohibit and punish, even to the forfeiture of property, it may thus deal with without first declaring the matter a nuisance; and whatever it has not a right by the constitution to prohibit and punish, it cannot thus deal with, even though it first fix upon it that odious name. To illustrate: the legislature has power, perhaps unlimited, over the public highways. It provides for opening, repairing, and vacating them. They are not the private property of the citizen. The legislature, therefore, may declare what obstructions shall be permitted, and what removed, whether they be, in fact, nuisances or not. So with Congress, in relation to the national highways for commerce. These

are public for purposes of navigation, and are perhaps completely under the legislative power. So the legislature, when the practice was to license houses for the exclusive retail of spirituous liquors, that is, the sale of them in particular quantities at particular places, could impose conditions upon which the license should be granted, and could make the violation of the conditions cause of forfeiture, whether it was such as rendered the retailing house a nuisance or not, and whether it was so denominated or not.

But the legislature cannot declare the path from my house to my barn, nor any obstruction I may place in it, a nuisance, and order it discontinued; nor can it declare my store room and stock of goods a nuisance, prohibit my selling them, and order them destroyed, because such acts would invade private property which the constitution protects. Still the fact may be that the path and the store room are nuisances which I have no right to maintain; for while I have the right to use my own property, still I must not so use it as to injure others. So all trades, practices and property, may, by the manner, time, or place of use, become nuisances in fact, in quality and subject, consequently, to forfeiture and abatement: for example, slaughter-houses in cities, or some descriptions of retailing houses; and this the legislature may have inquired into, and, if the fact of nuisance be found, may have the forfeiture and abatement adjudged and executed. And it is the province of the judiciary to conduct the inquiry, or deny it, as the truth may turn out to be. Many things, by such proceedings, have already become established nuisances at common law. By this mode, when a party loses his trade or property, he does so because of his own fault, and this according to the judgment of his peers, and the provision of the general law of the land, and not by the tyranny of the legislature, whose enactment may not be the law of the land. See numerous cases collected on this point, in the first chapter of Blackwell on Tax Titles.

In accordance with this doctrine, we find that the criminal code of this State has ever contained the general provision that any person who erected or maintained a nuisance should be fined, &c., and that the nuisance might be abated; 2 R. S. pp. 428, 429, secs.

8 and 9—a provision that submits it to the country, to wit, a jury, under the charge of the court, to decide the fact of nuisance. This provision the courts have been daily enforcing against various noxious subjects; and if breweries and casks of liquor are nuisances, why have they not been prosecuted and abated also? What was the need of this special law upon the subject? We have assumed thus far, upon this branch of the case, that the Constitution protects private property and pursuits, and the use of private property by way of beverage as well as medicine. It may be necessary, at this day, to demonstrate the fact.

The first section of the first article declares, "that all men are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness." Under our Constitution, then, we all have some natural rights that have not been surrendered, and which government cannot deprive us of, unless we shall first forfeit them by our crimes; and to secure to the enjoyment of these rights, is the great end and aim of the Constitution itself.

It thus appears conceded, that rights existed anterior to the Constitution—that we did not derive them from it, but established it to secure to us the enjoyment of them; and it here becomes important to ascertain, with some degree of precision, what these rights, natural rights, are.

Chancellor Kent, following Blackstone, says, vol. ii. p. 1: "The absolute [or natural] rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property;" not some property, or one kind of property, but, at least, whatsoever the society organizing government recognizes as property. How much does this right embrace—how far does it extend? It undoubtedly extends to the right of pursuing the trades of manufacturing, buying and selling, and to the practice of using. These acts are but means of acquiring and enjoying, and are absolutely necessary and incidental to them. What, we may ask, is the right of property worth, stripped of the right of producing and using? "The right of property is equally invaded by obstructing the free employment of the means of pro-

duction, as by violently depriving the proprietor of the product of his land." Say's Pol. Economy, 133.

In *Arrowsmith* vs. *Burlinger*, 4 McLean, 497, it is said, "A freeman may buy and sell at his pleasure. This right is not of society, but from *nature*. He never gave it up. It would be amusing to see a man hunting through our law books for authority to buy or sell or make a bargain." To the same effect Lord Coke, in 2 Inst. c. 29, p. 47; Rutherford's Institutes, p. 20. This great natural right of using our liberty in pursuing trade and business for the acquisition of property, and of pursuing our happiness in using it, though not secure in Europe from the invasions of omnipotent parliaments or executives, is secured to us by our Constitution. For, in addition to the first section which we have quoted, and aside from the fact that the very purpose of establishing the Constitution was such security, by Sect. 11, Art. 1, it is declared that we shall be secure in our "persons, houses, papers and effects, against unreasonable search and seizure." By section 21, we have the right to devote our labor to our own advantage, and to keep our property or its value for our own use, as they cannot be taken from us without being paid for. And by section 12 it is declared, that "every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law." These sections, fairly construed, will protect the citizen in the use of his industrial faculties, and in the enjoyment of his acquisitions. This doctrine is not new in this court. In *Doe* vs. *Douglass*, 8 Blackf. 10, in speaking of the limitations in our Constitution upon the legislative power, it is said, "they restrain the legislature from passing a law impairing the obligation of a contract, from the performance of a judicial act, and from any flagrant violation of the right of private property." This latter restriction, we think, is clearly contained in the 1st and 24th sections of the first article of our Constitution of 1816.

We lay down this proposition, then, as applicable to the present case: that the right of liberty and pursuing happiness secured by the Constitution, embraces the right, in each *compos mentis* individual, of selecting what he will eat and drink—in short, his

beverages, so far as he may be capable of producing them, or they may be within his reach, and that the legislature cannot take away that right by direct enactment. If the Constitution does not secure this right to the people, it secures nothing of value. If the people are subject to be controlled by the legislature in the matter of their beverages, so they are as to their articles of dress, and in their hours of sleeping and waking. And if the people are incompetent to select their own beverages, they are also incompetent to determine anything in relation to their living, and should be placed at once in a state of pupilage to a set of government sumptuary officers; eulogies upon the dignity of human nature should cease, and the doctrine of the competency of the people for self-government be declared a deluding rhetorical flourish. If the government can prohibit any practice it pleases, it can prohibit the drinking of cold water. Can it do that? If not, why not? If we are right in this, that the Constitution restrains the legislature from passing a law regulating the diet of the people, a sumptuary law, for that under consideration is such, no matter whether its object be morals or economy, or both, then the legislature cannot prohibit the manufacture and sale for use as a beverage, of ale, porter, beer, &c., and cannot declare those manufactured, kept and sold for that purpose a nuisance, if such is the use to which those articles are put by the people. It all resolves itself into this, as in the case of printing, worshipping God, &c. If the Constitution does not protect the people in the right, the legislature may probably prohibit; if it does, the legislature cannot. We think the Constitution furnishes the protection. If it does not in this particular, it does, as we have said, as to nothing of any importance; and tea, coffee, tobacco, corn bread, ham and eggs, may next be placed under the ban. The very extent to which a concession of the power in this case would carry its exercise, shows it cannot exist. We are confirmed in this view when we consider, that at the adoption of our present Constitution, there were in the State fifty distilleries and breweries, in which half a million of dollars was invested; five hundred men were employed; which furnished a market annually for two millions bushels of grain, and turned out manufactured

products to the value of a million of dollars, which were consumed by our people, to a great extent, as a beverage. With these facts existing, the question of incorporating into the Constitution the prohibitory principle, was repeatedly brought before the constitutional convention, and uniformly rejected. Debates in the Convention, vol. ii. p. 1434, and others. We are further strengthened in this opinion when we notice, as we will as matter of general knowledge, the universality of the use of these articles as a beverage. It shows the judgment of mankind as to their value. "This use may be traced in several parts of the ancient world. Pliny, the naturalist, states that in his time it was in general use amongst all the several nations who inhabited the western part of Europe; and, according to him, it was not confined to those northern countries whose climate did not permit the successful cultivation of the grape. He mentions that the inhabitants of Egypt and Spain used a kind of ale; and says that, though it was differently named in different countries, it was universally the same liquor. See Plin. Nat. Hist., lib. 14, c. 22. Herodotus, who wrote five hundred years before Pliny, tells us that Egyptians used a liquor made of barley. (2, 77.) Dion Cassius alludes to a similar beverage among the people inhabiting the shores of the Adriatic. Lib. 49, De Pannonis. Tacitus states that the ancient Germans, for their drink, used a liquor from barley or other grain, and fermented it so as to make it resemble wine. Tacitus De Mor. Germ., c. 23. Ale was also the favorite liquor of the Anglo-Saxons and Danes. If the accounts given by Isodorus and Orosinus, of the method of making ale amongst the ancient Britons be correct, it is evident that it did not essentially differ from our modern brewing. They state "that the grain is steeped in water and made to germinate; it is then dried and ground; after which it is infused in a certain quantity of water, which is afterwards fermented."

(Henry's History of England, vol. ii. p. 364.) "In early periods of the history of England, ale and bread appear to have been considered equally *victuals*, or absolute necessaries of life."

In biblical history, we are told that the "vine, a plant which bears clusters of grapes, out of which wine is pressed," "so

abounded in Palestine, that almost every family had a vineyard." Solomon, said to be the wisest man, had extensive vineyards, which he leased to tenants. Song 8, verse 12; and David, in his 104th Psalm, in speaking of the greatness, power and works of God, says, verses 14 and 15: "He causeth grass to grow for the cattle, and herb for the service of man; and wine that maketh glad the heart of man, and oil to make his face shine, and bread which strengtheneth man's heart."

It thus appears, if the inspired psalmist is entitled to credit, that man was made to laugh as well as weep, and that these stimulating beverages were created by the Almighty expressly to promote his social hilarity and enjoyment. And for this purpose have the world ever used them; they have ever given, in the language of another passage of Scripture, strong drink to him that was weary, and wine to those of heavy heart. The first miracle wrought by our Saviour, that at Cana of Galilee, the place where he dwelt in his youth, and where he met his followers after his resurrection, was to supply this article, to increase the festivities of a joyous occasion; that he used it himself is evident from the fact, that he was called by his enemies a wine-bibber; and he paid it the distinguished honor of being the eternal memorial of his death and man's redemption.

From De Bow's Compendium of the Census of 1850, p. 182, we learn, that at that date there were in the United States 1217 distilleries and breweries, with a capital of $8,507,574, consuming some 18,000,000 bushels of grain and apples, 1294 tons of hops and 61,675 hogsheads of molasses, and producing some 83,000,000 gallons of liquor.

From the Secretary of the Treasury's report of the commerce and navigation of the United States for 1850, we gather that there were imported into the United States, in that year, about 15,000,000 gallons of various kinds of liquors.

By the National Cyclopædia, vol. xii. p. 934, we are informed that for the year ending January 5, 1850, there were imported into Great Britain and Ireland, 7,970,067 gallons of wine, 4,950,781 of brandy, and 5,123,148 of rum; and that there were manufac-

tured in the same period, in that kingdom, in round numbers, 25,000,000 gallons.

In the 6th vol. of the same work, p. 328, it is said: "The vine is one of the most important objects of cultivation in France. The amount of land occupied by this culture is about 5,000,000 English acres. The average yearly product is about 926,000,000 English gallons, of which about one-sixth is converted into brandy. The annual produce of the vineyards is estimated at about £28,500,000 sterling, [near 140,000,000 dollars,] of which ten-elevenths is consumed in France." Wine is the common beverage of the people of France; and yet Professor Silliman, of Yale College, on the 17th of April, 1851, then at Chalous, writes, vol. i. p. 185, of his visit to Europe:

"In traveling more than 400 miles through the rural districts of France, we have seen only a quiet, industrious population, peaceable in their habits, and, as far as we had intercourse with them, courteous and kind in their manners. We have seen no rudeness, no broil or tumult—have observed no one who was not decently clad, or who appeared to be ill fed. We are told, however, that the French peasantry live upon very small supplies of food, and in their houses are satisfied with very humble accommodations. Except in Paris, we have seen no instance of apparent suffering, and few even there; nor have we seen a single individual intoxicated, or without shoes and stockings."

We have thus shown, from what we will take notice of historically, that the use of liquors, as a beverage, and article of trade and commerce, is so universal that they cannot be pronounced a nuisance. The world does not so regard them, and will not till the Bible is discarded and an overwhelming change in public sentiment, if not in man's nature, wrought. And who, as we have asked before, is to force the people to discontinue the use of beverages?

Counsel say, the maxim that you shall so use your own as not to injure another, justifies such a law by the legislature, but the maxim is misapplied; for it contemplates the free use by the owner, of his property, but with such care as not to trespass upon his neighbor; while this prohibitory law forbids the owner to use his own in

any manner as a beverage. It is based on the principle that a man shall not use at all for enjoyment what his neighbor may abuse, a doctrine that would, if enforced by law in general practice, annihilate society, make eunuchs of all men, or drive them into the cells of the monks, and bring the human race to an end, or continue it under the direction of licensed county agents.

Such, however, is not the principle upon which the Almighty governs the world. He made man a free agent, and to give him opportunity to exercise his will, to be virtuous or vicious as he should choose, he placed evil as well as good before him, he put the apple into the garden of Eden, and left upon man the responsibility of his choice,—made it a moral question, and left it so. He enacted as to that, a moral, not a physical prohibition. He could have easily enacted a physical prohibitory law by declaring the fatal apple a nuisance, and removing it. He did not. His purpose was otherwise, and he has since declared that the tares and wheat shall grow together to the end of the world. Man cannot by prohibitory laws be robbed of his free agency. See Milton's Areopagitica or speech for Liberty of unlicensed printing, Works, vol. 1, p. 166.

But notwithstanding the legislature cannot prohibit, it can, by enactments within constitutional limits, so regulate the use of intoxicating beverages, as to prevent most of the abuses to which the use may be subject. We do not say that it can all; for under our system of government, founded in a confidence in man's capacity to direct his own conduct, designed to allow to each individual the largest liberty consistent with the welfare of the whole, and to subject the private affairs of the citizen to the least possible governmental interference, some excesses will occur, and must be tolerated, subject only to such punishment as may be inflicted. This itself will be preventive in its influence. The happiness enjoyed in the exercise of general, reasonably regulated liberty, by all, overbalances the evil of occasional individual excess. "Order" must not be made to "reign" here as once "at Warsaw," by the annihilation of all freedom of action, crushing out, indeed, the spirit itself of liberty. With us, in the language of the then illustrious Burke, when defending the revolting American colonies, something must be pardoned to the spirit of liberty.

What regulations of the liquor business would be constitutional, it is not for us to indicate in advance; but those which the legislature may from time to time prescribe can be brought by the citizen to the constitutional test before the judiciary, and it will devolve upon that department to decide upon their consistency with the organic law; in fact, the question of power, of usurpation, between the people and the people's representatives; and in doing this, so far as it may devolve upon us, we shall cheerfully throw every doubt in favor of the latter, and of stringent regulations. Such is the constitution of our government. *Maize* vs. *The State*, 4 Ind. 342; *Thomas* vs. *The Board of Commissioners of Clay County*, 5 Ind. 557; *Greencastle Township* vs. *Black*, 5 Ind. 557; *Larmer* vs. *The Trustees of Albion*, 5 Hill, 121; *Dunham* vs. *The Trustees of Rochester*, 5 Cowen, 462; *Colter* vs. *Doty*, 5 Ohio, 393.

It is like the case of laws for the collection of debts. The constitution prohibits the passage of an act impairing the obligation of a contract; yet the legislature may regulate the remedy upon contracts, but must regulate within such limits as not substantially to impair the remedy, as that would indirectly impair the obligation of the contract itself. *Gantly's Lessee* vs. *Ewing*, 3 How. U. S. R. 707.

Regulations within constitutional limits, we have no doubt, if efficiently enforced, will accomplish, as we have said, nearly all that can reasonably be desired.

The legislature, we will add, may undoubtedly require the forfeiture of such particular portions of liquor as shall be kept for use in violation of proper regulations, as in the case of gunpowder stored in a populous city, and this forfeiture will be adjudged by the judiciary; see *Colter* vs. *Doty*, *supra*, but neither all the gunpowder nor liquor in the State, accompanied by the prohibition of the further manufacture and use of the article, can be forfeited on account of the improper use of a given quantity, because the entirety of neither of the articles is a nuisance. It is not pretended to be so as to gunpowder, and we think we have shown it is not so as to liquor. So, it is doubtless competent for the legislature to establish proper police regulations to prevent the introducing of foreign paupers, &c., for there is a palpable difference between ex-

cluding a foreign, and expelling a citizen pauper. The constitutional convention thought it might have power to prohibit the ingress of foreign, while it might not to compel the egress of resident negroes.

So, by such regulations, may the introduction of nuisances be prevented; for there is a wide difference between assuming to declare that a given thing is a nuisance, and the prohibiting of the introduction of what is conceded, or shall turn out to be, a nuisance.

And, in fact the restrictions in the constitution upon the legislative power may operate for the benefit of those living under, and in some sense a party to, its provisions, and not for that of strangers. It will not be denied that but for the constitution and laws of the United States which impose the restriction, the State, as an independent sovereignty, might exclude from her borders all foreign liquors, whether nuisances or not, unless, indeed, the doctrine upon which Great Britain was defended in forcing trade with China at the cannon's mouth be correct, that in this day of Christian civilization, it is the duty of all nations to admit universal reciprocal trade and commerce, a doctrine, not yet we think, incorporated into the code of international law.

And it would not follow that, because the State might prohibit the introduction of foreign wheat, she could, therefore, prohibit the cultivation of it within the State by her own citizens. The right of the State to prevent the introduction of foreign objects does not depend upon the fact of their being nuisances, or offensive otherwise; but she does it, when not restrained by the constitution or laws of the United States, in the exercise of her sovereign will.

This, however, is a topic involving questions of power between the State and Federal Governments, which we do not intend discussing in the present opinion. We limit ourselves here to the question of the power of the legislature over the property and pursuits of the citizen under the State constitution. The restrictions which we have examined upon the legislative power of the State were inserted in the constitution to protect the minority from the oppression of the majority, and all from the usurpation of the legislature, the members of which, under our plurality system of elec-

tions, may be returned by a minority of the people. They should, therefore, be faithfully maintained. They are the main safe-guards to the persons and property of the State.

It is easy to see that when the peeple are smarting under losses from depreciated bank paper, a feeling might be aroused that would under our plurality system, return a majority to the legislature, which would declare all banks a nuisance, confiscate their paper and the buildings from which it issues.

So with railroads, when repeated wholesale murders are perpetrated by some of them. And, in Great Britain and France, we have examples of the confiscation of the property of the churches even; which, here, the same constitution that protects the dealer in beer, would render safe from invasion by the legislative power.

In our opinion for the reasons given above, the liquor act of 1855 is void. Let the prisoner be discharged.

Supreme Court of Louisiana, 1855.

GAINES' APPEAL, *in re* SUCCESSION OF DANIEL CLARK.[1]

1. The provision of the Code of Louisiana, which requires for the proof of an olographic will, the "testimony of two credible witnesses, who declare that they recognize the testament as entirely written, dated and signed, in the testator's handwriting, as having often seen him write and sign during his lifetime," (Art. 1648,) is directory merely, and does not, where such proof is wanting by reason of accident, as in the case of a lost or destroyed will, exclude secondary evidence of the will. LEA, J., dissenting.
2. Contents of an alleged lost or destroyed olographic will, admitted to probate after the expiration of forty years, the delay being explained, upon evidence establishing the former existence and principal contents of such a will, and the probability of its due execution in accordance with the Code; though it did not affirmatively appear that the witnesses had ever seen the testator write or sign his name, in his lifetime. LEA, J., dissenting.

[1] Buchanan, J. took no part in the decision of this case.

Other branches of this same controversy, have been at different times before the Supreme Court of the United States. See, 13 Peters' Reports, 404; 15 Idem. 9; 2 Howard's Reports, 619; 6 Idem, 550; 12 Idem, 472; in which last decision the illegitimacy of the present appellant was held to be established.

This was an appeal from the decision of the Second District Court of New Orleans, refusing probate of the contents of an alleged olographic will of the late Daniel Clark.

The petition of the proponent, filed January 18th, 1855, was in the following words:

To the Hon. the Second District Court of New Orleans:

The petition of Myra Clark Gaines, who resides in the City and State of New York, respectfully represents that, on the sixteenth day of August, A. D. 1813, Daniel Clark, then residing in New Orleans, departed this life, leaving no descendants except your petitioner, who is the daughter of the said deceased; that on the thirteenth day of July, 1813, the said Daniel Clark made his last will, which was in substance and to the effect following:

"New Orleans, July 13th, 1813. In the name of God—Amen. I, Daniel Clark, of New Orleans, do make this my last will and testament. Imprimis: I order that all my just debts be paid.

Second. I do hereby acknowledge that my beloved Myra, who is now living in the family of Samuel B. Davis, is my legitimate and only daughter; and that I leave and bequeath unto her, the said Myra, all the estate, whether real or personal, of which I may die possessed, subject only to the payment of certain legacies hereinafter named.

Third. It is my desire that my friend, Chevalier François Dusuan Delacroix, shall have the charge of my said daughter Myra, and I do appoint and constitute him tutor to her.

Fourth. I give and bequeath to my mother, Mary Clark, now or recently of Germantown, in the State of Pennsylvania, an annuity of two thousand dollars, which is to be paid out of my estate, during her life. I further give and bequeath an annuity of five hundred dollars to Caroline Degrange, until she arrives at the age of majority, after which I give and bequeath her a legacy of five thousand dollars.

Fifth. I hereby nominate and appoint my friends, François Dusuan Delacroix, James Pitot, and Joseph D. D. Bellechasse, my

executors, with full power to execute this my last will, and to settle everything relating to my estate."

Petitioner further avers, that the said will contained other legacies and dispositions—that said testator gave a legacy of $5,000 to a son of the said Pitot, and another of $5,000 to a son of Mr. DeBuys, both of New Orleans; he also provided for the freedom and maintenance of his slave Lubin. In his said will, the said Clark made an inventory of his estate, with explanations of his business relations, and gave instructions to the said tutor Delacroix, in regard to the education of your petitioner. She further represents that the said will was an olographic one, wholly written, dated and signed by the testator in his proper handwriting, and at the death of the said Clark, was left among his papers at his residence. That after his decease, diligent search was made for the said will, but the same could not be found, nor has it been since, and it was either mislaid, lost, or destroyed. That the destruction of the said will has prevented her from giving the contents thereof, with any greater certainty than as set forth herein above. Petitioner further shows, that Messrs. Bellechasse and Pitot, two of the above named executors, are dead; that the said Delacroix—the other, is indisposed to accept the executorship of the said will—and that no presumptive heirs of the said Clark reside in this State. She further shows, that at the decease of the said Clark, and for many years after, she was a minor, wholly ignorant of her rights under the said will, and that after she arrived at the age of majority, and was made acquainted with the matters aforesaid, she instituted suit the 18th of June, 1834, in the Probate Court of New Orleans, for the purpose of proving the said will; but that said suit was dismissed, as in case of nonsuit, on the 8th day of June, 1836, without any fault of your petitioner. That in the year 1836, she instituted suit by Bill in Chancery, in the Circuit Court of the United States for the Eastern District of Louisiana, to set up the said will, and enforce her rights as universal legatee under the same, but that the Supreme Court of the United States dismissed her claim under the said will, as in case of nonsuit, without deciding on the merits of the cause, and without the fault of your petitioner.

Wherefore, she prays that this honorable court would fix a day, place and hour, for the proof of the said will; and after all due proceedings, such as the law requires, that the same may be recorded and its execution ordered, and for general relief; and she will ever pray, &c.

(Signed,) SMILEY & PERIN,
P. E. BONFORD,
MOISE & WM. RANDOLPH,
Attorneys for Petitioner.

Upon this petition an order was made allowing proof of the will referred to, to be made at a day fixed. On the evidence then adduced, however, the court below was of opinion that the will had not been duly established according to the requirements of the Code; whereupon this appeal was taken.

The facts sufficiently appear in the opinion of the majority of the Supreme Court, which was delivered by

MERRICK, Ch. J.—In this case we adopt the carefully prepared statement of facts of the judge of the lower court; it is in these words, viz:

"The petitioner alleges that on the 16th day of August, 1813, the late Daniel Clark, her father, departed this life, having previously, viz: on the 13th day of July, 1813, executed an olographic last will and testament, by which he recognized her as his legitimate and only daughter, and constituted her his universal legatee, said bequest being subject, however, to the payment of certain specific legacies; that he appointed François Dusuan Delacroix, James Pitot, and Jos. Bellechasse, the executors of said will; that said will was wholly written, dated, and signed in the handwriting of the testator, and at his death left among his papers at his residence; that after his death, diligent search was made for the said will, but that the same could not be found, nor has it been since, and that it was either mislaid, lost or destroyed. It is unnecessary to recapitulate more in detail the alleged contents of the will, or to advert to the history of events as set forth in the petition, under which, the

court is called upon to recognize this lost document as a valid testament, after an interval of more than forty years, since the death of the alleged testator. The litigation, of which the present proceedings appears to be an upspringing shoot, is incorporated in the jurisprudence of the country, and a reference to it will not materially assist in the solution of the question submitted for adjudication. The petitioner asks that the will, such as she describes it, be admitted to probate, registered and ordered to be executed.

"To entitle the petitioner to a judgment, recognizing the existence and validity of the will, it is necessary that she should establish affirmatively, and by such testimony as the law deems requisite:

"First, That Daniel Clark did execute a last will containing the testamentary dispositions set forth in her petition.

"Second, That Clark died without having destroyed or revoked it.

"In looking for the testimony which might solve the question, whether such a will had ever been executed or not, a reasonable inquirer would naturally turn for information to those who were most with the deceased in the latter part of his life, and especially (if they could be found) to those who were with him in the last moments of his existence, when the hand of death was on him. Such witnesses, if they had no interest in diverting his property into any particular channels, might be considered as the best and most reliable that could be produced, and it appears to be precisely testimony of this character that the petitioner presents in support of her application. It appears that Boisfontaine had business relations with the deceased which brought him into frequent intercourse with him, and that for the last two days of his life, and up to the moment of his death, he was with him; that Delacroix and Bellechasse were intimate personal friends, and that they were with him shortly before his death.

"Now these witnesses all concur in stating that Clark *said* he had executed a will posterior to that of 1811. They also testify that within a few months prior to his death, he was making arrangements for the disposal of his property by a last will. He called on Delacroix to get his consent to act as executor, and also to act as tutor to his daughter Myra, expressing his intention of making

generous provision for her in his will. Delacroix further states that Clark afterwards presented to him in his (Clark's) 'cabinet' a sealed packet, which he declared to be his last will, informing him, at the same time, that in case of his death, it would be found in a small black trunk which he had there. Boisfontaine, who was with Clark when he died, says that Clark, in his last illness, spoke of executing his last will; said it was to be found in a small black trunk in a room below stairs; that he had left the greater portion of his property to his child Myra; that Bellechasse, Delacroix and Pitot were to be his executors, and that about two hours before he died, he instructed his confidential servant, Lubin, that in case of his death, the small black trunk above referred to was to be delivered to Delacroix, and enjoined upon him as soon as he (Clark) was dead, to be sure to take it to him. He says that Clark expressed his satisfaction that he had provided for his daughter Myra, leaving her all his estate, and that Delacroix had consented to act as her tutor. He also states that he was present about fifteen days before Clark's death, when Clark took from the small black case a sealed package and presented it to Delacroix, stating that it was his last will, recapitulating some of its provisions, and reminding him of his promise to act as tutor to his daughter. He further states that several persons, shortly before Clark's death, had seen the will and corroborated Clark's statement as to its contents, and that Judge Pitot, Lynd the Notary, the wife of Wm. Harper, and Bellechasse, were among the persons referred to." Now the judge *a quo* proceeds: "I think there can be no doubt, setting aside the testimony of Bellechasse and Mrs. Wm. Harper, that Clark did execute a will shortly before his death; that the principal object of making this will was to recognize as his daughter the present applicant, and to make suitable provision for her; that the executors of his will were Pitot, Bellechasse and Delacroix, and that Delacroix was appointed tutor to his daughter Myra; that this will must have been in existence until within a very short time previous to Clark's death, if not after that event, and that Clark himself died believing it was in existence.

"That such was the opinion of Delacroix himself at the time is

evident from the fact that twenty-four hours had scarcely elapsed after the probate of the will of 1811, before he made oath, that he verily believed, that Daniel Clark had made a '*testament posterior to that of* 1811,' '*that its existence was known to several persons,*' and he accordingly applied for and obtained an order of the court, commanding every notary in the city to declare whether such document had been deposited with him.

"If the foregoing facts may be considered as proved, independent of the testimony of Bellechasse and Mrs. Wm. Harper, the additional testimony of these last named witnesses with reference to the form of the execution of the will and its contents, will rest upon a basis of probability which must strengthen, if it does not anticipate the conviction of its truth; for it is to be remembered that Clark knew how to draw an olographic will in due form, having already done so in the execution of the previous will, and knowing what was necessary to its validity, it would be improbable in the extreme that he would omit any of the few necessary formalities.

"When Bellechasse and Mrs. Harper therefore testified directly to the execution of the will as having been written, dated, and signed in the proper handwriting of the testator, they testify to the existence of facts which are at least probable, and upon the assumption that the will was executed are matters approaching to certainty, independent of their testimony; so with regard to the appointment of executors, of the tutor and of the general dispositions of the will as described in the petition.

"They state Clark did what he told others he intended to do, and what, from the whole tenor of his conduct, it was very probable he would do.

"It does not appear, however, that all the contents of the will, as sworn to by Mrs. Wm. Harper, are also sworn to by Bellechasse, and though the testimony of the latter does not contradict that of the former, but affirms it, yet his testimony does not relate to any portions of the will except such as relate to its form, the institution of his daughter as universal legatee, and the appointment of Delacroix, Pitot and Bellechasse as executors; indeed, the examination of witnesses does not appear to have been conducted with any

reference to a detailed description of the will. They, however, both state distinctly that they read the will; that it was wholly written, dated and signed by Clark; that he thereby instituted Myra Clark, his daughter, universal legatee, and appointed Delacroix, Pitot and Bellechasse his executors." From an examination of the whole testimony, and considering the conduct of the deceased, his repeated declarations up to the very day of his death, together with his anxiety to make ample provision for his daughter, the judge of the lower court added, "I feel satisfied that the legal presumption (which, in the case of a lost will, would necessarily exist,) that it was destroyed or revoked by the testator, must be considered as satisfactorily rebutted."

In addition to the statement of facts and conclusions in regard to them by the judge of the lower court, it may be remarked that Delacroix states that the endorsement upon the will which he saw sealed up was in these words: "Pour être ouvert en cas de mort." This endorsement does not appear upon the will of 1811, and the will which he saw was doubtless the will of 1813. In regard to the testimony of Colonel Bellechasse and Mrs. William Harper, there is nothing on this record which impeaches their credibility.

If it be objected that the amount of property left by Clark may have induced them to swerve from the truth, the reply has equal force, that there would be just as strong a reason for any other party in interest to have prevented the execution of the will, by its destruction. It may be remarked further, that the universal legacy being established beyond question, the particular legacies which tend to diminish the estate which will come into the hands of the universal legatee, are sufficiently proved, on general principles, against such legatee, by the testimony of a single witness, because these legacies are alleged and set up in the petition of the party who is to be charged with them, and she cannot be permitted afterwards to deny what she has alleged in her pleadings.

Agreeing fully as we do with the conclusions arrived at by the district judge, as to what has been proven, the only remaining question for us to solve is one of law, and it is, has this will been proven in conformity to Article No. 159, page 244 of the Old Code,

or Article 1648 of the New Code, which requires for the proof of the olographic will, the testimony of two credible witnesses, who declare that they recognize the testament as being entirely written, dated and signed in the testator's handwriting, as having often seen him write and sign during his lifetime?

The witnesses have sworn that the will was entirely dated and signed by Daniel Clark, but they nowhere say that they have often seen him write. They show an intimacy and relationship which leave little room to doubt that they really were well acquainted with his handwriting, and had probably seen him write often, as required by the Code, but they have not expressly said so.

The question can, therefore, be answered only by determining whether the provisions of law contained in this article of the Code are sacramental, and must be pursued in all cases, or whether they are merely directory, and the courts have power, in certain cases where this proof is wanting, by reason of accident, to avail themselves of the secondary proof—the next best of which the nature of the case will admit.

It would seem that there is a distinction between rules of law which prescribe the form in which wills and testaments are to be made, and those which direct the courts in what manner they shall be admitted to probate, and ordered to be executed. The first commencing at Article 1567 of the Civil Code are positive enactments, which are essential to the validity of the will. Their non-observance renders the supposed will null and void, by express provision of law. C. C., 1588. The rules, on the other hand, which are prescribed by the legislature for the opening and proof of testaments, commencing at article No. 1639, do not pronounce the penalty of nullity for their non-observance, and they nowhere say that other cases may not arise in which the strict letter of these rules may be inapplicable, and that the judge may not, in extraordinary cases, receive other equally satisfactory proof that the requirements of the law have been fulfilled.

In a nuncupative will by public act, it is required that certain formalities should be observed, before a notary public and three

witnesses. Without these observances the will would not exist as such.

The olographic will must be entirely written, dated and signed by the testator. Without the observance of these requisites, there is no legal will; and so of the other forms. But whenever these forms have been observed, there is then a valid will entirely independent of its probate, or any subsequent proceeding which may be commenced upon the same. But the law says that this valid will shall remain inoperative until it receive the order for its execution by the judge of the probate court. But it has never been pretended that the validity of this will is, in any manner, affected by the character of the proof, which the judge of the lower court may deem sufficient, on which to base his order. If the will is really valid, the irregular proof on which he may base his decree, cannot render it invalid. The will subsists, and therefore the judgment might be corrected on appeal; yet, if it were suffered to remain, the courts would never permit a party to lose his right by a mere irregularity in the proof upon which the decree was founded. *Faulkner* vs. *Field*, 1 Rob. La. 48. So in the case before us; the will of 1811 was admitted to probate by Judge Pitot, upon the single declaration of the witnesses, "that the same was in the proper handwriting of him, the said Daniel Clark." No one will pretend that this will was rendered invalid, because those witnesses did not swear that they had often seen Daniel Clark write. Had the will afterwards been attacked, on the ground that the will was not in the handwriting of Daniel Clark, it would doubtless have been sustained, on satisfactory proof, that it was entirely written, dated and signed in the handwriting of the testator.

The distinction which we here draw between the positive enactments of law, in regard to the form for the execution of wills, and the directory provisions in regard to the proof of the same, seems to have been fully recognized by our predecessors. In the case of *Bouthemy* vs. *Dreux et als.*, 12 Mart. R., page 639, the court maintained a nuncupative will by private act, which had been admitted to probate on the testimony of a single witness, notwithstanding Article No. 159, page 244 of the Old Code. The distinction was also

taken in the case of The succession of Robert, Pelié executor, 2 Rob. La. 433; also, in effect, in the case of The succession of Eubanks, 9 Ann. R. 147, where a witness was admitted to testify who did not possess the qualifications required by Article 1584, C. C. This distinction also pervades the jurisprudence of France on this subject. By Article No. 1007 of the Code Napoleon, it is made the duty of the judge to make a procès verbal of the presentation of the olographic will, the opening of it, the order in which he found it, and the order of deposit with the notary. These provisions appear to be considered directory only. Paillet, note 2 to Article 1007, Code Napoleon, says:

"La présentation du testament au président du tribunal, l'ouverture des testaments par magistrat, et le procès verbal qu'il doit dresser ainsi que de l'état du testament, sont sans contredit des précautions que la loi a cru nécessaires, pour qu'on peût être assuré de plus en plus de la volonté des testateurs; mais la loi n'a point attaché à l'inobservation de ces formalités de la peine de nullité, et on ne saurait la prononcer, surtout lorsque rien n'indique de fraude de la part de l'héritier institué ou du légataire." See note and authorities there cited.

Taking it, therefore, as granted that the distinction which we have indicated exists, the next question which presents itself is, do the circumstances of this case take it out of the rule prescribed by Article No. 1648 of the Civil Code? We think the loss or destruction of the will after the death of Clark, and the long period of time which has elapsed since his death, justify a resort to secondary evidence, which would not have been necessary, if the will had not been lost or destroyed, and if so long a period had not elapsed before an attempt had been made to admit it to probate. We think this view of the law is fully sustained, both by reason and authority.

Article 1648 contemplates that the olographic will shall be presented before the judge before whom it is to be proven. Yet none would seriously contend that the calamity which deprived the legatee of the will, would prevent him from establishing its contents by secondary evidence. Were this the law, a reward would be offered to villany, and it would always be in the power of the unscrupulous heir to prevent the execution of the will. The case of *Thomas et*

al. vs. *Thomas*, 2 L. R. 166, was a controversy in regard to a lost will, which it had been alleged had already been admitted to probate. The objection to the proof was: "That parol proof of the execution of the will could not be given in that court; that a will, being an instrument clothed with certain formalities prescribed by law in order to give it effect, no evidence of its loss or its contents could be offered until its existence, with the requisite formalities, had been proved."

Judge Porter, as the organ of the court on this point, remarks with his usual felicity: "The first objection is entitled to more consideration, but we still believe it unsound. The law of evidence would have a poor claim to the praise justly bestowed on it, if it did not foresee and provide for such a case as this. That rule which is the most universal, namely, that the best evidence the nature of the case will admit, shall be produced, decides the objection; for it is only another form of expression for the idea, that when you lose the higher proof you may offer the next best in your power. *The case admits of no better evidence than that which you possess, if the superior proof has been lost without your fault.*

"The rule does not mean that men's rights are to be sacrificed and their property lost, because they cannot guard against events beyond their control. It only means, that so long as the higher or superior evidence is within your possession, or may be reached by you, you shall give no inferior proof in relation to it. Particular rules which require written proof always relax themselves to meet absolute necessity, or that necessity which is occasioned by occurrences common among men.

"There is nothing in a will being required to be made in a particular form, which makes it an exception to this great law of necessity. It may increase the difficulty of proof, but furnishes no reason to refuse hearing it. The court, in this case, had proof before them which much diminished the danger of parol evidence.

"In the case of The succession of Maria J. Robert, Pelié executor, 2 Rob. Rep. 484, which was a contest growing out of an olographic will executed in France, and there deposited, the proof was by witnesses who were acquainted with the handwriting of the tes-

tatrix. It does not appear that they had often seen her write. The court, after holding this sufficient, as being all which was required by the law of France, says: "It has been insisted, however, that Articles 1648 and 1649 of our Code show that the original will ought to be produced, in order to be identified with the testimony of the witnesses who have recognized it; and that, in its absence, the evidence would be incomplete. This position would perhaps be correct, if the witnesses were in personal attendance before the court of probate; but these articles are not negative laws; they do not say that no other kind of proof shall be admitted, and we doubt very much whether, under their application, if an olographic testament executed here, had by some accident been destroyed before being legally proved, a true copy of it, identified with the original, by the testimony of two credible witnesses who had seen both, and who would be able to swear to the genuineness of the original, in the manner pointed out by law, should not be considered as sufficient compliance with the provisions of our code.

"Surely we are not prepared to say that, in such a case, the legal rights acquired under the will would also be defeated, and that the party would be left without a remedy. This is, indeed, an analogous and even stronger case, and as, in our opinion, the law-makers cannot have intended to require an impossibility, we must conclude that, under such circumstances, the proof furnished by the appellants is a sufficient compliance with the requisites of the codes, and that the inferior judge did not err in ordering the execution of the will under consideration."

In view of these decisions of our own courts, in regard to the construction of Article No. 1648, it is not necessary to examine the decisions of the court, on analogous articles of the Civil Code, and the Code of Practice, in order to arrive at a conclusion on this. The doctrine of the common law is in consonance with the view taken by our own courts. The books are filled with adjudged cases, in regard both to lost deeds and wills. We will content ourselves by citing one—the case of *Dan* vs. *Brown*, 4 Cowen, 483. The suit was brought upon a *lost will* devising real estate. By the

statute laws of New York, a will devising real estate was required to be proved by three credible witnesses. The Supreme Court of New York say, in regard to this lost will: "The will of Benajah Brown was proved by one of the subscribing witnesses. He stated it was executed in the presence of himself, James Mallory, and another person, whose name he did not recollect, but which he had no doubt of his being a credible witness. This," the court adds, "was all the evidenee which could be expected under the circumstances of the case."

Considering that the administration of justice requires something more than the application of the letter of the law designed for one class of cases of ordinary occurrence, to all others, however they may have been modified by accident, and believing that the spirit of our laws provides for the case which the applicant has presented to us, we conclude that the will of 1813, such as she has set forth in her petition, should be admitted to probate.

It has been objected, as we understand the argument, that this court has no jurisdiction of this case on appeal, under the Constitution, because there is no *contestatio litis* formed, and because there are no proper parties to the appeal. We dismiss this objection with the single observation, that it is not necessary under the Constitution, that there should be a technical *contestatio litis*, in order to give this court jurisdiction; and if the attorney of absent heirs were even necessary as a party, his presence here is sufficient to sustain this appeal.

We are not insensible to the argument that this claim has remained for forty years without being set up in a court of justice, in a form to be prosecuted to effect, and that rights have been recognized under the sales made under the will of 1811. The staleness of petitioner's suit is best answered by reference to the litigation in which the petitioner's alleged rights have been prosecuted in other forms; and we may suppose it did not become necessary to resort to the unusual proceeding of applying for the probate of a lost will, until after those cases were decided. The plaintiff presents to us a *prima facie* case, which entitles her to relief.

The decision which we make does not exclude any one who may

desire to contest the will with her in a direct action, and to show that no such will was executed. On the other hand, a refusal to probate the will places it beyond the power of the applicant to set up her rights under the will, against any other person.

It is therefore ordered, adjudged and decreed by the court, that the judgment of the lower court be avoided and reversed; and, proceeding to render such judgment as should have been rendered in the lower court: It is ordered, adjudged and decreed, that the will of Daniel Clark, dated New Orleans, July 13, 1813, as set forth in plaintiff's petition, be recognized as his last will and testament, and the same is ordered to be received, recorded and executed as such; and it is further ordered that François Dusuan De la Croix be confirmed as testamentary executor of said last will and testament, and that letters testamentary issue to the said De la Croix, and that the costs of this proceeding be borne by the succession.

LEA, J., who had been also judge of the court below, at the time of the offer of the will in question for probate, dissented.

In the Court of Errors and Appeals of the State of Delaware, October, 1855.

UNION CHURCH OF AFRICANS *vs.* ELLIS SAUNDERS.

Under the voluntary system of church government, in this country (except, it would seem, in cases of actual endowment), a mandamus cannot issue to compel the trustees or members of a particular church to admit a minister to the exercise of his spiritual functions, and this, though he may have been duly appointed thereto by the superior ecclesiastical authority, — e. g. by a Methodist yearly Conference,—especially if the right of consent is reserved by charter or agreement to such trustees or members.

The opinion of the court was delivered by

JOHNS, Ch.—The Superior Court, on the petition of Ellis Saunders, having awarded the writ of mandamus, commanding the Union Church to admit him to the exercise of the functions of his office, the case has been brought before this court by writ of error.

In the record certified and the assignment of errors, we have presented several questions for our consideration. It does not appear necessary to notice all the objections, unless we should be of opinion the Superior Court had jurisdiction. This question of jurisdiction, as the most important, I shall therefore proceed to consider. The writ of mandamus is a legal remedy for a legal right. The petitioner states the injury to be the refusal of the trustees of the Union Church of Africans in Wilmington, to admit him to preach in the said church whenever he may see proper so to do, and to administer the ordinances and discipline thereof, and to exercise a pastoral charge over the same, and asks the aid of the secular court by writ of mandamus. The party thus seeking the interposition of the civil power to enforce submission to the exercise of his official functions, founds his right so to do, upon the discipline and usages of the Methodist Church, and alleges that by virtue thereof, he being an elder minister, it is his duty and right to preach in the said Union Church in Wilmington, whenever he may see proper so to do, and to administer the ordinances and discipline thereof, and to exercise a pastoral charge over the same. These functions are spiritual, and emanate from and are conferred by ecclesiastical authority. It is not stated that any endowment exists, or any temporal emolument. Upon this ground there could be no color for sustaining the application. The English decisions recognize the right to the office of rector, as involving a legal right, because the established church being a constituent part of the constitution, has a legal foundation and consequently a legal existence. Hence the rector is seised of his church and glebes, and if dispossessed may have remedy by writ of mandamus, which is a legal remedy for a legal right. Under their toleration acts, by analogy the same jurisdiction has been exercised. As in the case of *Rex* vs. *Barker*, 3 Burr., 1268, the church being endowed by deed. Justice Foster remarked "here is a legal right. Their ministers are tolerated and allowed, their right is established as a legal right and as much as any other legal right." But in England if no legal title and no endowment, the writ of mandamus will not be awarded, and has been refused. Thus in *King* vs. *Bishop of London*, 1 Term R. 333, which re-

sembles in some respects the present case, Lord Mansfield remarked, there is no color for granting the writ, the office is not endowed, it depends upon voluntary contribution. In 4 Term R. 125, a similar opinion is expressed by Lord Kenyon. Such has been the judgment of eminent judges under a system of government uniting Church and State. But in our country, and in our State, where the constitution declares "that no power shall or ought to be vested in or assumed by any magistrate, that shall in *any case* interfere with, or in *any manner* control the rights of conscience in the free exercise of religious worship," it would appear reasonable to conclude, that all ecclesiastical offices and functions are excluded from the jurisdiction of the civil courts.

Regarding the ecclesiastical system as based upon the voluntary principle, it therefore has neither legal capacity nor legal existence and is incapable, sui juris, of acquiring or holding temporal property. Hence the necessity arises for acts of incorporation, or trustees by deed, for the purpose of acquiring and holding property through the instrumentality of lay corporations or laymen. But the church in its ecclesiastical order, functions, and discipline remains intact, free from, and independent of the civil or secular jurisdiction.

In accordance with the principle of the English decisions, we find a case in 4 Harris & McHenry's Reports, page 448, which sustains the civil jurisdiction on the ground, that the church was endowed; but admitted that emoluments depending on voluntary contribution, would not be sufficient to warrant the court in issuing a mandamus. The present case presents no such question for our consideration, there being no endowment or permanent interest.

But it has been urged in support of the petitioner's right, that he being an elder minister, qualified according to the discipline and usage of the Methodist Church, is entitled to the use of the said "Union Church," in Wilmington, by virtue of the second article of the agreement which was executed and recorded at the time when the religious society was formed and their trustees created a body corporate in conformity with the provisions of the general act of 1787.

The second article declares "the said corporation shall have, hold, possess, and enjoy the temporal property in trust for the religious uses of the ministers and preachers of the said Union Church, for them and their African brethren, and their descendants of the African race, duly licensed and ordained according to the discipline adopted by the corporation." From this, it would seem, that no such right could be derived from a license and ordination conferred by a yearly conference, composed of persons not members of the said corporation, but acting independent of it, and in conflict with the articles of agreement, although such action may have been in strict conformity with the ecclesiastical order, and discipline of the Methodist Church.

It is apparent from the articles of agreement, that they were designed to establish an independent church, subject to the control of the corporation, exclusive of all other influence over its temporal affairs and property, except that of the members of the corporation. That this was the object contemplated by the written agreement, is manifest from the express provisions contained in the sixth article, in the following words: "that no minister or teacher shall be privileged to preach or exhort in the said Union Church, but with the consent of the trustees and a majority of the said corporation;" and at the close of said article "that the by-laws and regulations which shall be made by the trustees from time to time, together with these articles of association, shall be deemed and taken to be the true foundation of said church and the foundation on which the said corporation shall exist."

If then, we allow the agreement of this religious society its legitimate effect, there can be no doubt, that without the consent of the trustees, no minister can have a right to use the pulpit of the said Union Church. The action of the annual conference, set forth in the petition, cannot annul this provision, so clearly expressed in the sixth article, and relied on in the return made to the alternative mandamus.

Under this aspect of the case, it is only required of us to decide whether the authority of the yearly conference is paramount, or the written agreement of the members of the association; the law of the